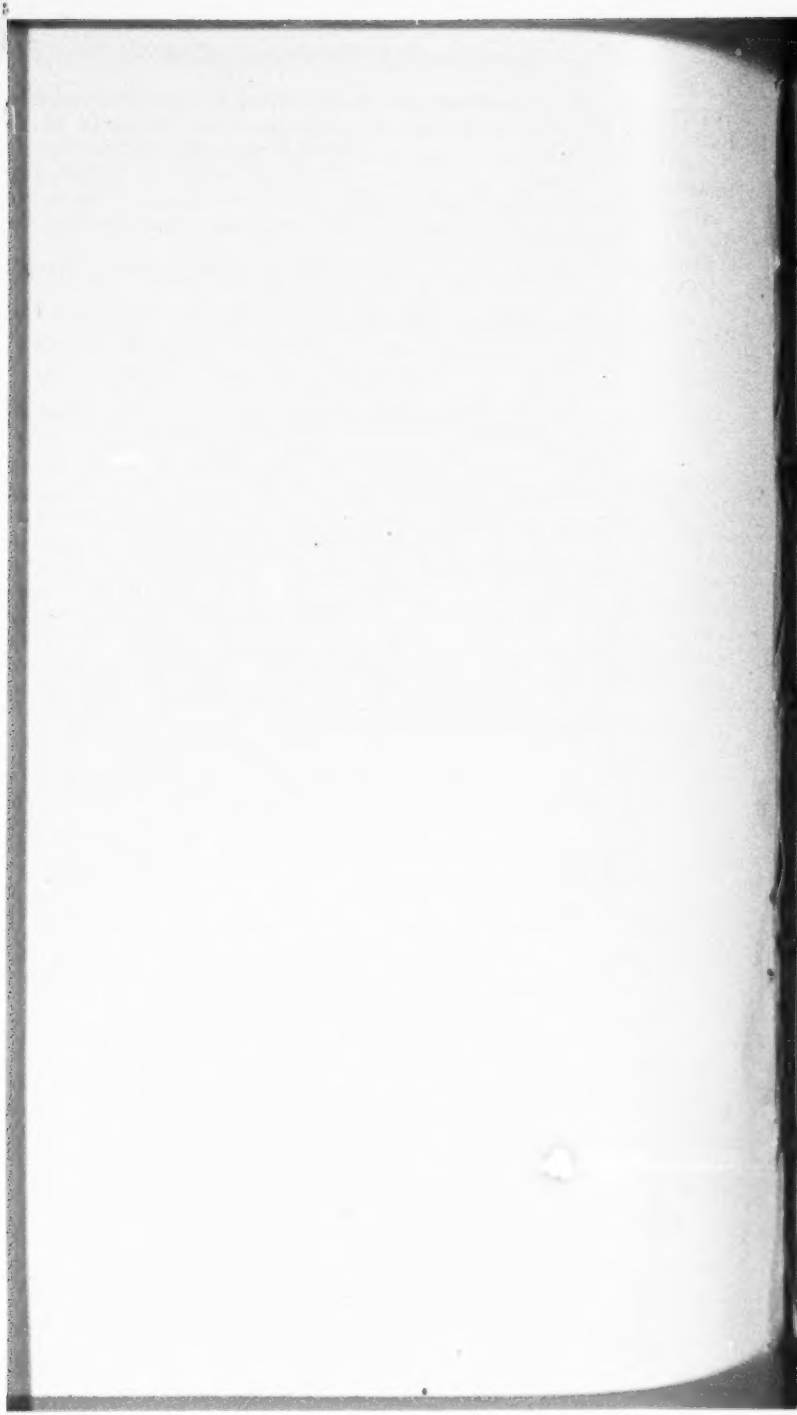

No. 18

FILED
JAN 24 1901
JAMES H. MCKENNEY

By. of Payson & Evarts for Appts

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 18

Filed Jan. 24, 1901.

THE SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, Trustees, and THE CENTRAL TRUST COMPANY OF NEW YORK,
Appellants,

against

THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

L. E. PAYSON,
MAXWELL EVARTS,
Of Counsel for the Appellants.

C. G. Burgoyne, Walker and Centre Streets, New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 152.

THE SOUTHERN PACIFIC RAILROAD COMPANY, D. O. MILLS and HOMER S. KING, Trustees, and THE CENTRAL TRUST COMPANY OF NEW YORK,
Appellants,

against

THE UNITED STATES OF AMERICA,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

Statement.

By the third section of the Act of Congress approved July 27, 1866, and entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast" (14

U. S. Stat., 292) lands were granted to the Atlantic and Pacific Railroad Company in aid of its projected line from the Town of Springfield, Missouri, to the Pacific Ocean (Act printed in full in Appendix, p. I).

By the 18th section of the same Act of Congress a contemporaneous grant of lands was made to the Southern Pacific Railroad Company, of California, in aid of a road connecting with the proposed road of the Atlantic and Pacific Railroad Company near the boundary line of the State of California, and running to San Francisco (Appendix, p. XIV.). This grant is known as the "Southern Pacific Main-Line Grant."

On the 28th of June, 1870, Congress passed a joint resolution approving the route indicated by the map filed by the Southern Pacific Railroad Company on January 3, 1867, and making certain provisions as to the examination by the Secretary of the Interior of the various sections of the railroad when completed and as to the issuing of patents to said company for the lands granted by said Act of July 27, 1866 and coterminous to each constructed section of road (Appendix, p. XVI.).

By Section 23 of the Act of Congress approved

March 3, 1871, and entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes" (16 U. S. Stat., 573), a grant of land was made to the Southern Pacific Railroad Company of California in aid of a line of railroad from a point at or near Tehachapa Pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado River. This grant is known as the "Southern Pacific Branch-Line Grant" and was made upon the like terms and conditions as the Main-Line Grant under the Act of 1866, above referred to, but subject to the proviso that it should "in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company" (Appendix, p. XVII.).

All three of these grants (the grant to the Atlantic and Pacific, and the Main-Line and Branch-Line Grants to the Southern Pacific) were made upon the terms and conditions of the 3d section of the Atlantic and Pacific Act, which prescribed (in States) primary or granted limits ten alternate sections (*i. e.*, twenty miles) in width on each side of the railroad line adopted

by the Company, and indemnity limits extending ten miles beyond such primary limits.

The Atlantic and Pacific Railroad Company never built any portion of its projected railroad in the State of California, and on the 6th of July, 1886, an Act of Congress was passed (24 U. S. Stat., p. 123), forfeiting and restoring to the public domain the lands theretofore granted to said Railroad Company by the said Act of July 27, 1866 (Appendix, p. XVIII.).

After the Atlantic and Pacific Forfeiture Act of 1886, the Southern Pacific Railroad Company claimed in the Department of the Interior that (as the Atlantic and Pacific Company had ceased to have any claim thereto) it was entitled to the lands common to the primary limits of the two contemporaneous grants under the Act of 1866 to the Atlantic and Pacific Railroad Company and the Southern Pacific Railroad Company (Main-Line Grant), but Secretary Lamar held that the right of the Southern Pacific Company was only to a moiety of such lands (Appendix, p. XIX.).

It was further claimed in the Department of the Interior on behalf of the Southern Pacific Railroad Company, both as to its Main-Line and Branch-Line Grants, that, upon the forfeiture of the lands

granted to the Atlantic and Pacific Railroad Company, the Southern Pacific Company was entitled to select, in lieu of its losses within the primary limits of its Main or Branch Line grants, any of the lands which had been restored by such Forfeiture Act to the public domain, upon the principle that the right of the grantee in respect of indemnity lands depended entirely upon the status of such lands at the date of selection.

The United States thereupon, and on May 14, 1894, filed in the United States Circuit Court for the Southern District of California the bill of complaint in this suit against the Southern Pacific Railroad Company and other defendants seeking to quiet the title of the United States to the lands restored to the public domain by the Atlantic and Pacific Forfeiture Act, and to restrain the Southern Pacific Railroad Company from making any claim thereto (Rec., p. 8).

The lands involved in this suit are the sections of land designated by odd numbers within thirty miles on each side of the located route of the Atlantic and Pacific Railroad as shown by the maps filed by the Atlantic and Pacific Company in the General Land Office (except those lands embraced in then pending suits of the

United States against the Southern Pacific Railroad Company) (Rec., p. 36), and the prayer of the bill is "that the defendants be perpetually enjoined from having or claiming any right, title or interest in or to said lands from, through or under said acts of Congress, approved July 27, 1866, or March 3, 1871, or the joint resolution of Congress approved June 28, 1870" (Rec., p. 37).

The case was tried before the Honorable ERSKINE M. ROSS, United States Circuit Judge for the Southern District of California, and on the 6th day of June, 1898, a final decree was entered in the cause enjoining and restraining the Southern Pacific Railroad Company from having or claiming any right, title, interest or lien in or to any of the lands referred to in the bill of complaint, and the title of the United States to said lands was quieted, with the exception of the lands embraced in then pending suits brought by the United States against the Southern Pacific Railroad Company, and excepting, also, lands which, prior to the commencement of this suit, were sold by the Southern Pacific Railroad Company to third persons, who purchased the same in good faith and for value, as to which lands it was adjudged that the

United States should take nothing (Rec., p. 336 *et seq.*).

Judge Ross in his opinion does not enter into any discussion of the issues raised by the pleadings in the cause, but merely holds that they are no longer open questions because of previous decisions of the Supreme Court of the United States. He says (at page 366 of the Record):

> "These grants were the subjects of full consideration in cases heretofore brought in this Court and finally determined on appeal by the Supreme Court of the United States: United States vs. Southern Pacific Railroad Company, 146 U. S., 570; United States vs. Colton Marble and Lime Co. and United States vs. Southern Pacific Railroad Company, 146 U. S., 615; and Southern Pacific Railroad Company vs. United States, 168 U. S., 1. In my opinion those decisions of the Supreme Court determined that the Southern Pacific Company by its grants acquired no interest or right in or to any of the odd-numbered sections of land embraced within the granted or indemnity limits of the Atlantic and Pacific Railroad Company, and mortgaged none of its codefendants."

From the final decree of June 6, 1898, an appeal was taken by the Southern Pacific Railroad Company and its co-defendants to the United States Circuit Court of Appeals for the Ninth

Circuit (Record, p. 600); and on October 2, 1899, a decree was entered in said Court affirming the decree below (Record, p. 2672).

From the decree of said Circuit Court of Appeals of October 2, 1899, the present appeal to this Court has been taken (Record, p. 2680).

Assignment of Errors.

The Circuit Court of Appeals erred:

I. In not reversing the decree of the Circuit Court made and entered herein on June 6, 1898, and directing the said Court to render a decree dismissing the bill of the United States.

II. In deciding that the United States are the owners by title and fee simple absolute, or the owners in anywise, of the lands, or any of them, in controversy, and described in the pleadings and in the decree of the Circuit Court herein.

III. In deciding that the defendants and appellants, each of them, be enjoined and restrained from having or claiming any right, title, interest or lien in or to the lands, or any of them, in controversy, and described in the pleadings and in the decree of said Court herein.

IV. In deciding that the defendants and ap-

pellants were not entitled to a moiety in that part of the lands in controversy which is common to the place limits of the grant to the Alantic and Pacific Railroad Company, and the place limits of the Main-Line Grant of the Southern Pacific Company, under the contemporaneous grants to the two companies by the Act of Congress, approved July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast."

V. In deciding that the defendants and appellants were not entitled to all lands within the primary limits of the Southern Pacific Main-Line Grant which also fell within the indemnity limits of the Atlantic and Pacific Grant, the two grants being contemporaneous grants under the said Act of Congress approved July 27, 1866.

VI. In deciding that the defendants and appellants were not entitled by reason of the grant under the said Act of Congress, approved July 27, 1866, to select lands which were within the indemnity limits of the Main Line Southern Pacific Grant, and which prior to the Atlantic and Pacific Forfeiture Act had not been selected by the Atlantic and Pacific Railroad Company,

notwithstanding that such lands had formerly been also within the indemnity limits of the Atlantic and Pacific Grant.

VII. In deciding that the defendants and appellants were not entitled to select lands within the Southern Pacific indemnity limits, under either its Main-Line or Branch-Line Grants, notwithstanding that such lands had formerly been within the place or indemnity limits of said Atlantic and Pacific Grant.

THE DECISIONS IN THE FORMER CASES.

It is important that the Court should have well in mind the questions which have already been decided by this Court in previous cases relating to the Southern Pacific and Atlantic and Pacific Grants, as well as the questions which are presented upon this appeal, and before taking up the argument of this case we deem it useful to state in some detail the gist of the decisions in United States vs. Southern Pacific Railroad Company, 146 U. S., 570; United States vs. Colton Marble and Lime Co., and United States vs. Southern Pacific Railroad

Company, 146 U. S., 615, and Southern Pacific Railroad Company vs. United States, 168 U. S., 1.

THE CASE OF UNITED STATES VS. SOUTHERN PACIFIC RAILROAD COMPANY, 146 U. S., 570:

The lands in controversy in this case were lands common to the primary or place limits of the Atlantic and Pacific Grant and of the Southern Pacific *Branch-Line* Grant. (It is to be observed that no such controversy arises in this case, which, so far as Southern Pacific place lands are concerned, is limited entirely to the *place* lands under the Southern Pacific *Main-Line* Grant, which was contemporaneous with the Atlantic and Pacific Grant and not in anywise subsequent thereto. The difference in the principles applicable to the place lands under the Southern Pacific *Main-Line* Grant of 1866 and to the place lands under the Southern Pacific *Branch-Line* Grant of 1871 is too obvious to require further comment.)

This case in 146 U. S. simply held that the prior grant to the Atlantic and Pacific in 1866 and the subsequent Branch-Line Grant to the Southern Pacific in 1871 were grants *in præsenti*, and that upon the filing by

the Atlantic and Pacific in April, 1872, of its map of definite location, the title to its place lands attached as of July 27, 1866, the date of its granting act, which was over five years before the date of the Branch-Line Grant to the Southern Pacific. In other words, the title to the place lands under the Atlantic and Pacific grant was to be deemed to have passed to that Company in 1866, and remained its property until the Forfeiture Act of 1886. This Court further held that, upon the restoration of the Atlantic and Pacific place lands to the public domain, the Branch-Line Grant to the Southern Pacific, *so far as its place lands were concerned*, was in no way affected or extended, and that, if the latter had no claim before the Act of Forfeiture to such restored lands falling within its place limits, it had none thereafter.

CASES OF UNITED STATES VS. COLTON MARBLE AND LIME COMPANY, AND UNITED STATES VS. SOUTHERN PACIFIC RAILROAD COMPANY, 146 U. S., 615:

The lands involved in these cases were within the place limits of the Southern Pacific *Branch* Line under the Act of 1871 and the indemnity

limits of the Atlantic and Pacific Company. (It is sufficient for the present to say that there is no controversy in the present case in regard to any land within the *place* limits of the Southern Pacific *Branch*-Line Grant.)

The decision of this case was put upon the single ground that the Southern Pacific *Branch*-Line Grant of 1871 was made upon the express condition that it should "in no way affect or impair the rights, present or *prospective*, of the Atlantic and Pacific Railroad Company," and that, by the use of the word "prospective," Congress intended that lands falling within the Atlantic and Pacific indemnity limits—that is, lands to which it had a *prospective right of selection*—should not be subject to be taken as *place* lands under the Southern Pacific *Branch*-Line Grant.

In the course of the opinion Mr. Justice BREWER was very careful to point out that the question would have been very different if the Southern Pacific had been claiming the right to select *indemnity* lands under its *Branch*-Line Grant of 1871 from the lands of the Atlantic and Pacific grant which had been restored to the public domain by the Forfeiture Act of 1886. At page 618 he said:

> "It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and that they are not lands in respect to which that company would have a right of selection, and might defer the exercise of that right until such time as suited it. Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection."

CASE OF SOUTHERN PACIFIC RAILROAD COMPANY VS. UNITED STATES, 168 U. S., 1:

As appears from the opinion of Mr. Justice HARLAN, the only lands to which any claim was made by the Southern Pacific Railroad Company in this case, and the only lands as to which the Court gave any consideration in coming to its decision, were the lands within the limits of the Southern Pacific *Branch*-Line Grant under the Act of 1871. That is, the case did not relate in any way to the lands covered by the Main-Line Grant under the Act of 1866. At page 29 he said:

"The Southern Pacific Railroad Company

constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above Act of 1871."

Again at page 46 it was said:

"The lands now in controversy are situated opposite to and are coterminous with the first, second and fourth sections of the Southern Pacific Railroad as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas and Pacific Act of March 3, 1871."

It is no doubt true that a part of the land embraced within the limits of the Southern Pacific *Branch*-Line Grant was also included within the limits of the Southern Pacific *Main*-Line Grant, as by reason of the proximity of the two lines at certain points the lands granted to them overlap. It was not known at the time the case in 168 U. S. was brought or tried that the Southern Pacific had title under the Main-Line Grant (as well as the claim which it, in fact, asserted in the suit under the Branch-Line Grant) to a small portion of the lands embraced in that suit, and this fact was not observed until that case was being prepared for argument upon appeal.

The suit was brought by the United States to quiet its title to the forfeited Atlantic and Pacific lands which were also within the limits of the *Branch*-Line Grant to the Southern Pacific under the Act of 1871. The pleadings of both parties were framed to meet this issue alone. No claim to the lands embraced in the suit was asserted under the Main-Line Grant. The evidence taken in the case related only to the rights of the Southern Pacific under the Act of 1871. Furthermore, the cases were argued on appeal upon the theory that this was the sole issue in the case, and the Court undertook to decide such question only and nothing else.

The decision of this Court was that the Southern Pacific Railroad Company was concluded by the decisions of the Court in 146 U. S., and that under the settled principles of *res judicata* it was too late for it to undertake to reopen the question of whether the map filed with the Land Department in 1872 by the Atlantic and Pacific was a map of "definite" location or a map of "general or preliminary route."

It is to be noticed that the cases reported in 146 U. S. all relate solely to the *Branch*-Line Grant to the Southern Pacific under the Act of

1871; and as the case in 168 U. S., now being discussed, was decided upon the ground that the land grants involved therein were the same as the land grants in controversy in the cases in 146 U. S., it is most persuasive evidence that the Court in this case understood that the controversy before it related only to the Southern Pacific *Branch*-Line Grant under the Act of 1871.

In other words, the decisions in the Southern Pacific Railroad cases in 146 U. S. and 168 U. S. relate only to the land grant to the Southern Pacific under the Texas Pacific Act of 1871, and such decisions did not, and did not pretend to, determine any question in regard to the Southern Pacific land grant under the Act of 1866, known as the "Main-Line Grant."

The two facts to be kept in mind in regard to the cases in 146 U. S. and 168 U. S. are:

FIRST. That the only lands in controversy in the cases in 146 U. S. were lands within the *place* limits of the Southern Pacific *Branch*-Line Grant.

SECOND. That the case in 168 U. S. was decided solely upon the ground that the only questions raised therein had been decided adversely to the railroad company in the cases in 146 U. S.

FIRST POINT.

The Southern Pacific Railroad Company is entitled to a moiety of the conflicting place lands granted to it and the Atlantic and Pacific Railroad Company under the Act of 1866.

The lands involved in this point are shown in red on Map 1.

It is the well-established doctrine of this Court that when lands are granted by the same Act of Congress to aid in the construction of two railroads, which lands necessarily overlap, each grantee takes as of the date of the grant an equal undivided moiety of the lands within the conflicting place limits of the two roads.

In the case of the Sioux City, &c., Railroad vs. United States, 159 U. S., 349, it appeared that the land grants to the Chicago, Milwaukee and St. Paul Railway Company and to the Sioux City & St. Paul Railroad Company were under the same Act of Congress of May 12, 1864, and it was there held that the railroads took the lands common to the place limits of the two grants as tenants in common. Mr. Justice HARLAN, who delivered the opinion of the Court, said at page 364:

MAP(S) IS/ARE TOO LARGE TO BE FILMED

"The rule is well settled that when lands are granted by acts of Congress of the same date, or by the same act, to aid in the construction of two railroads that must necessarily intersect, or which are required to intersect, each grantee—the map of definite location having been filed and accepted—takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines.

* * * * *

"The grants for the Sioux City and Milwaukee roads were by the same act. Of the granted sections in place limits common to both roads each company, having filed its map of definite location, took, as of the date of the grant, an equal undivided moiety—no more. The equal undivided moiety granted for one road was not granted, nor could it be used, for the other road. Congress knew when it passed the Act of 1864 that there would be an overlapping of place limits at the required point of intersection of the two roads."

In Donahue vs. Lake Superior Canal, &c., Co., 155 U. S., 386, it appeared that by the Act of Congress of June 3, 1856, grants of land were made in aid of the construction of two railroads, one from Marquette to the State line, and one from Ontonagon to the State line. These grants

were bestowed by the State of Michigan separately upon the two companies. Subsequently the Chicago and Northwestern Railway Company, the beneficial owner of both the Marquette and Ontonagon grants, released the title to the lands within these grants to the State of Michigan. The State of Michigan, however, by its Legislature, authorized a release only of the lands granted in aid of the construction of the Marquette road. It was held by this Court that upon the location of the Ontonagon and Marquette railroads the lands within their conflicting place limits were held by them in undivided moieties, and that, upon the release of the title to these lands to the State and the release by the State to the United States of the Marquette grant only, a novel condition "resulted, in that it left the State and the United States joint owners, each holding the title to an undivided moiety of this body of lands." Notwithstanding the novelty of the situation it was decided that the State and the United States were joint owners of the lands in controversy upon the ground that conflicting place lands under contemporaneous grants are equally divided between the grantees. The syllabus of the case upon this point is as follows:

> "As the land in controversy is near the crossing of two lines that had received separate grants, it is further subject to the rule that where two lines of road are aided by land grants made by the same act, and the lines of those roads cross or intersect, the lands within the 'place' limits of both at the crossing or intersection do not pass to either company in preference to the other, no matter which line may be first located or built, *but pass in equal undivided moieties to each.*"

In Sioux City Railroad vs. Chicago Railway, 117 U. S., 406, the question came up as to the rights of the railway companies in land within the place limits common to the two grants, which were under the same Act of Congress, and it was held that they took this land in equal undivided moieties. At page 409 of his opinion Mr. Justice MILLER said:

> "Of the lands in controversy there were $50{,}539\,^{73}/_{100}$ acres within the ten-mile limits of both roads. This the decree of the Circuit Court held to belong to the companies in equal undivided moieties, and appointed commissioners to make partition of them. This part of the decree was upon the principles we have stated correct, and must be affirmed."

In the case of St. Paul Railroad vs. Winona Railroad, 112 U. S., 720, it was held that:

> "When the acts of Congress in such cases [land grants] are of the same date, or grants are made for different roads by the same statute, priority of location gives no priority of right; but, where the limits of the primary grants which are settled by the location conflict, as by crossing or lapping, *the parties building the roads under those grants, take the sections, within the conflicting limits of primary location, in equal undivided moieties*, without regard to priority of location of the line of the road, or priority of construction." (Syllabus.)

There is, of course, no question but that the Atlantic and Pacific Railroad and the Southern Pacific Railroad Company received grants of land in aid of their respective railroads under the same Act of Congress. The Atlantic and Pacific grant was under the third section of the Act of 1866 (Appendix, p. VI.). The Southern Pacific grant, known as the "*Main*-Line Grant," was under the eighteenth section of the same act (Appendix, p. XIV.). The grants are therefore contemporaneous, and, under the rule of this Court referred to, it is plain that the grantees thereunder became entitled to an undivided one-

half interest in all the conflicting lands within the place limits of both grants.

It was certainly the understanding of the officers of the Interior Department that the United States, by reason of the Atlantic and Pacific Forfeiture Act, became the joint owners with the Southern Pacific of the place lands common to both the Southern Pacific *Main*-Line Grant and the Atlantic and Pacific Grant; and on the 25th of November, 1887, Secretary Lamar instructed Commissioner Stockslager to notify the Southern Pacific Railroad Company to that effect (VI. L. D., 349). We have printed the letter in full at page XIX. of the appendix to this brief, and we quote only the following paragraphs:

> "The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land, not of the character excepted by the grant, and within the ten-mile limit, subject, however, to be divested to the extent of a half interest in every such odd section that might fall within the common limits of both roads, after the filing of the map of definite location by the Atlantic and Pacific Company.

"The Atlantic and Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic and Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title of a half interest in all such odd sections, *and from that moment and by that act the two companies became entitled to equal undivided moieties in such sections*, without regard to the priority of location of the line of the road, or priority of construction, the right of each company relating back to the date of the grant. St. Paul and Sioux City R. R. Co. vs. Winona and St. Paul R. R. Co. (112 U. S., 720); Sioux City R. R. Co. vs. Chicago R. R. Co. (117 U. S. 406).

* * * * *

"The interest of the Atlantic and Pacific Company having been forfeited to the United States, *the effect of said forfeiture was to make the United States a tenant in common with the Southern Pacific Company as to the lands*, and therefore all the odd sections within said limits should still remain in reservation until a partition thereof has been made."

Secretary Lamar was simply following the rule to which we have referred to the effect that the grantees under the same Act of Congress of lands within the primary limits of grants in aid of railroads, which necessarily intersect or run in close proximity upon parallel courses, take such lands as tenants in common, which rule had for the first time been definitely announced by this Court about two years before in the case of St. Paul Railroad vs. Winona Railroad, 112 U. S., 720.

We know of no reason to doubt that the effect of the Forfeiture Act of 1886 was correctly stated by Secretary Lamar. This Act undertook to forfeit and restore to the public domain only the interest of the Atlantic and Pacific in the lands acquired under the Act of 1866, and such interest as to the place lands common to the two grants under said act was simply an undivided one-half interest therein. The claim now made by the Southern Pacific is not to anything which the Southern Pacific would not have been equally entitled to if the Forfeiture Act had not been passed. The Southern Pacific is not seeking any enlargement of the grant to it under the Act of 1866 by reason of the Forfeiture Act of 1886. It is simply

insisting that the right and title to this land which it had before the Atlantic and Pacific Forfeiture Act has not been taken from it because of such act. In other words, the contention now made is that the Southern Pacific had an undivided one-half interest in this land prior to the Act of 1886, and that such interest could not be taken from it by any act which sought simply to forfeit the interest of the Atlantic and Pacific, and that the only result of such forfeiture act was to substitute the United States in place of the Atlantic and Pacific Company as the tenant in common with the Southern Pacific Railroad Company of such land.

Just what answer can be made to this proposition is not at all obvious. The only reason given by the Court below, why this claim was not sustained, was that it was *res judicata* because of the decisions in 146 U. S. and 168 U. S., which have been before referred to. At page 2660 of the record the Circuit Court of Appeals said:

> " It follows that the claim now made that in any event the two companies take the lands within the conflicting lines in equal, undivided moieties, must be considered as having been adjudicated and determined adversely to the claim of the Southern Pacific Company."

We respectfully submit that this Court has never made any such adjudication or determination, and will not do so now.

As we have already pointed out, it was never supposed that any of the place or indemnity lands of the Southern Pacific *Main*-Line Grant were involved in any of the previous litigations arising between the parties to this cause, until it was discovered upon the argument upon appeal in the case reported in 168 U. S. that the Southern Pacific might properly have claimed title under the Main-Line Grant to a small portion of the lands involved in that suit, but there treated only in their relation to the Branch-Line Grant. The decision of the Circuit Court of Appeals in the present cause, however, seems to show that no *place* lands of the Southern Pacific *Main*-Line Grant were in controversy in the case in 168 U. S., 1, for at page 2652 of the record it is said in the opinion of the Court below, in describing the lands involved in the case in 168 U. S., 1, after stating the kinds of lands covered by the *Branch*-Line Grant, that:

> "In addition to these lands [Branch-Line lands] there were lands within the primary

limits of the Atlantic and Pacific Grant and the *indemnity limits* of the Southern Pacific Main-Line Grant.

"It will be observed that the lands involved in these various suits embraced all the four classifications of land in conflict between the Atlantic and Pacific Grant and the Southern Pacific *Branch-Line Grant*, and that in the last case there is a classification of land in conflict between the Atlantic and Pacific Grant and the Southern Pacific Main-Line Grant."

It is very evident from the foregoing concise statement by the Circuit Court of Appeals in regard to the lands involved in the cases reported in 146 U. S. and 168 U. S., that that Court recognized that as a matter of fact there was no claim to *place* lands of the Southern Pacific *Main*-Line Grant involved therein, even though, as above stated, there were involved in the case in 168 U. S., 1, a small amount of land in respect to which a claim might have been (but was not) asserted under the provisions of the *Main*-Line Grant. That being so, it is not clear how it can be said that the question whether the place lands common to the Atlantic and Pacific and Southern Pacific *Main*-Line Grants belonged to the two railroads as tenants in common as of

the date of the granting act (which is the question now before the Court) has been, or could ever have been, adjudicated in any previous litigation between the parties to this cause.

The theory by which the Circuit Court of Appeals arrived at the conclusion that the prior decisions of this Court were a bar to any consideration by it of this question of a moiety in the common place lands of the Atlantic and Pacific and Southern Pacific *Main*-Line Grants seems to have been (if we have comprehended it rightly) that this Court considered the cases from the aspect of what title the United States had acquired to the lands in the Atlantic and Pacific grant by the Forfeiture Act of 1886, and that, having decided that the United States had acquired a title to a portion of the Atlantic and Pacific grant, it must be deemed to have so decided as to the balance of the land within the Atlantic and Pacific grant, although the conditions and circumstances in regard to the balance of the land were very different. In other words, the Court below has decided that, because this Court has held that X as against Y is entitled to lot A, therefore X as against Y is entitled to lot B.

As we understand it, the doctrine of *res judi-*

cata has never yet been extended so far as to hold that, where a man claims the possession and ownership of a tract of land under two separate titles, and an action of ejectment is brought against him as to a portion of the tract, and he sets up in his answer only one of his titles thereto and is defeated, he is thereafter estopped and in any way precluded in a subsequent action of ejectment in regard to another portion of the tract of land from setting up the other title under which he claims to own the land.

The rule was declared by Mr. Justice SHIRAS in the case of Roberts vs. Northern Pacific Railroad, 158 U. S., 1, 27, as follows:

> " It is apparent, therefore, that the q estion or point actually litigated in the State Court was not the same with those before the Federal Court, and hence, as the causes of action in the two courts were not the same, the judgment in the State Court, while it might determine the controversy between the parties to it as respects the pieces of land there in question, could not be conclusive in another action upon a different claim or demand."

In the much-cited case of Cromwell vs. County of Sac, 94 U. S., 351, it was held that a plaintiff who had been defeated in one action upon cou-

pons cut from county bonds because he failed to show that he was a *bona fide* holder for value, was not precluded from showing, in a subsequent action brought to recover on other coupons cut from the same bonds, that he was such *bona fide* holder for value of such other coupons. Mr. Justice FIELD, in the course of his opinion, said at pages 352, 353 and 356:

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. * * *
>
> "But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, to matters arising in a suit upon a different cause of action, the inquiry must always be

as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. * * *

" *It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand,* although loose remarks looking in that direction may be found in some opinions. *On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.*"

In Last Chance Mining Co. vs. Tyler Mining Company, 157 U. S., 683, Mr. Justice BREWER said at page 687 :

" The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided."

To the same effect are the following cases:

Davis vs. Brown, 94 U. S., 423.
Nesbit vs. Riverside Independent District, 144 U. S., 610.
Wilmington & Weldon R. R. Co. vs. Alsbrook, 146 U. S., 279, 302.
Keokuk and Western Railroad vs. Missouri, 152 U. S., 301, 314, 415.

The foregoing cases would seem to show conclusively that the failure to assert a defense in one action did not preclude the party from setting it up in a subsequent action between the same parties, if the matter in controversy in the subsequent action was different from that involved in the first action.

THE RELATION OF JOINT RESOLUTION OF 1870 TO THE LANDS COVERED BY MAIN LINE GRANT:

It is stated in the opinion of the Court below that the Southern Pacific Railroad Company at the time of the passage of the Act of July 27, 1866, was not authorized by its State charter to build a road from Mojave to the Needles, and that it did not obtain such authority from the State Legislature until April 4, 1870 (Record, p. 2659). The argument is then suggested, but is

in no way made the basis of any conclusion of the Court, that, as the State in 1866 had not authorized the Southern Pacific to build the road in the counties through which it afterward passed, therefore it was not in a position to take advantage of the land grant under the Act of Congress of 1866.

It is not at all clear why it should ever have been supposed that any authorization by a State Legislature was necessary in the case of a grant by the United States, but the question would seem to be put entirely at rest by the decision of this Court in *California vs. Pacific Railroad Co.*, 127 U. S., 1, 44, where it was distinctly held that the Act of the State Legislature of April 4, 1870, was entirely unnecessary, and that the franchise to build the road was fully conferred upon the Southern Pacific by the Act of Congress of July 27, 1866. At page 44 of the opinion, Mr. Justice BRADLEY, speaking for the Court, said:

> "An examination of the acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad, at such point near the boundary

line of the State of California, as it should deem most suitable for a railroad line to San Francisco; and, to aid in the construction of such a railroad line, Congress declared that the company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa Pass, by way of Los Angeles, to the Texas Pacific road at the Colorado River (Fort Yuma). The Southern Pacific Company was not authorized by its original charter to extend its railroad to the Colorado River, as we already know by other cases brought before us, and as appears by the act of the State Legislature passed April 4, 1870, which assumed to authorize the company to change the line of its railroad so as to reach the eastern boundary line of the State; thus duplicating the power given to it by the Act of Congress (see the State act quoted in 118 U. S., p. 399). *This State legislation was probably procured to remove all doubts with regard to the company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress*, and that franchise was accepted, and the roads have been constructed in conformity thereto."

It would seem unnecessary to argue this question further. Our proposition simply is that the question of whether the United States by the Forfeiture Act of 1886 acquired title to all the place lands common to the Atlantic and Pacific Grant and the Southern Pacific *Main*-Line Grant under the Act of 1866, or only to an undivided moiety thereof, has never in any way directly or indirectly been presented to any Court prior to the case at bar; that this Court, by its previous decisions in regard to the Southern Pacific *Branch*-Line Grant in 146 U. S. and 168 U. S., in which it held that said Forfeiture Act was not for the benefit of the Southern Pacific, never intended to be understood as saying that land not belonging to the Atlantic and Pacific, but being at the time of the act the property of the Southern Pacific, was forfeited by such act and restored to the public domain; and that we are not precluded by any prior decisions of this Court from having the question now presented for consideration examined and determined upon its merits.

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SECOND POINT.

The Southern Pacific Railroad Company is entitled to all lands within the PLACE limits of its MAIN-Line Grant, which also fall within the indemnity limits of the Atlantic and Pacific Grant.

The lands covered by this point are shown in red upon Map 2.

It would seem entirely unnecessary to discuss this question, as it has been squarely decided by this Court that when there are grants to two railroad companies under the same Act of Congress, and *place* lands under one grant conflict with *indemnity* lands under the other grant, the railroad company whose *place* lands fall within the overlap, is entitled to them exclusively, and the railroad company within the *indemnity* limits of which the lands are situated has no interest in or claim to them.

This question came up in Sioux City Railroad vs. Chicago Railway, 117 U. S., 406. In the court below the land within the *place* limits of the Sioux City road and the *indemnity* limits of the Milwaukee road had been divided equally between the two companies. This Court, how-

ever, reversed the decree below in this respect, and decided that the Sioux City road was entitled to all the land within its *place* limits which at the same time fell within the *indemnity* limits of the Milwaukee road. Mr. Justice MILLER, in speaking of the lands in controversy, said at page 409:

> "1. Of these, 63,796 $^{24}/_{100}$ acres are within the ten-mile limit of the Sioux City road, and *not* within the ten-mile limit of the Milwaukee road, though they are within its twenty-mile limit. * * *
>
> "The principles we have stated, and which were fully considered in The St. Paul Company vs. The Winona Company, exclude the Milwaukee Company in this case from invading the ten-mile limit of the Sioux City road to seek indemnity for losses by reason of lands within its own ten-mile limit previously disposed of. This 63,796$^{24}/_{100}$ acres, being odd sections within the ten-mile limit of the Sioux City road and not within the ten-mile limit of the Milwaukee road, belonged exclusively to the former, and the latter company had no interest in them. The decree is in that respect erroneous, and must be reversed, and all these lands given to the Sioux City Company."

Again in the same case, when the position was reversed, it was held that land within the *place* limits of the Milwaukee Company and the *indem-*

nity limits of the Sioux City Company belonged exclusively to the former company, and that the Sioux City Company had no interest therein. As to this it was said in the opinion at page 409:

> "2. Of the lands in controversy there were $33,071^{8}/_{100}$ acres within the ten-mile limit of the Milwaukee road, and *not* within the ten-mile limit of the Sioux City road, but within its twenty-mile limit, which, according to the ruling of the Circuit Court, were equally divided between the two companies. * * * For the same reasons which govern with regard to the $63,796^{24}/_{100}$ acres just disposed of, this part of the decree must be reversed and these $33,071^{8}/_{100}$ acres given to the Milwaukee Company."

One of the questions in the case of the Chicago, St. Paul, Minneapolis and Omaha Ry. Co., XI. L. D., 607, was as to the title of lands within the *primary* limits of the grant to the Wisconsin Central, which were also within the *indemnity* limits of the Omaha Company. The grants to the two railroads were contemporaneous, and under the Act of Congress of May 5, 1864 (13 U. S. Stat., 365). It was held by Secretary Noble, at page 609, as follows:

> "But as to the conflict between the primary limits of the Wisconsin Central and

> the twenty miles indemnity limits of the Omaha Company the rule is different. Both companies deriving their grant from the same act, the Wisconsin Central is clearly entitled to the land in question, without regard to either priority of location or construction. This rule is well settled."

It has already been held by the Interior Department that the very lands now in question were unaffected by the Forfeiture Act of 1886, as appears by Secretary Lamar's letter to Acting-Commissioner Stockslager, of November 25, 1887, in which he stated that the Commissioners had decided that:

> "The lands within the granted limits of the Southern Pacific main line and the indemnity limits of the Atlantic and Pacific, *are not affected by said act of forfeiture*" (Appendix, p. xx.).

If, prior to the Forfeiture Act of 1886, the Southern Pacific was entitled absolutely to all lands within its place limits which happened to conflict with lands within the indemnity limits of the Atlantic and Pacific Grant, and if the latter company had no interest in or claim to such lands whatever (as would seem to be well settled by the foregoing decisions) of course

the vested right of the Southern Pacific in such land could not be taken from it by an Act of Congress which forfeited and purported to forfeit only the rights and interests of the Atlantic and Pacific therein. If said land did not belong to the Atlantic and Pacific at the time of the Forfeiture Act and said company had no interest therein how can it be seriously argued that by such Forfeiture Act the land was taken away from the Southern Pacific and restored to the public domain?

It is idle for the counsel for the Government to say that the Southern Pacific is now estopped from raising this question upon the ground that it has been already adjudicated against it in the cases in 146 U. S. and 168 U. S.

There was no claim to *place* lands under the Southern Pacific *Main*-Line Grant involved in any of those cases, so that it was impossible that this matter should be adjudicated, and, furthermore, this Court has never in any case overruled its prior decisions upon the subject above referred to. Under the decision in the Sioux City Case in 117 U. S., 406, the Southern Pacific is unquestionably entitled to the *place* lands within its main-line grant which are in conflict

with the Atlantic and Pacific indemnity lands. This case has never been overruled or its doctrine modified, but the decision of the Court in that case is the law on that subject to-day. The Court neither in 146 U. S. nor in 168 U. S. has held the contrary, or in anywise modified the doctrine of that case. It must have completely reversed it if the question now before this Court upon this point is *res judicata* against the Southern Pacific Company. As was said in Holmes vs. Oregon & Cal. R. R. Co., 7 Sawy., 380, 399: "It cannot be supposed that it was the intention to overrule long established principles without even mentioning the cases in which they were elaborately discussed and established." We therefore respectfully submit that the plea of *res judicata* is without avail as to the claim that the Southern Pacific is entitled to all lands within the *place* limits of its main-line grant which happen to also fall within the indemnity limits of the Atlantic and Pacific Grant, and that we are entitled to have this question considered and determined without any regard to the prior decisions of this Court in 146 U. S. and 168 U. S.

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THIRD POINT.

The Southern Pacific Railroad Company is entitled to select as indemnity under its Main-Line Grant lands within the indemnity limits of that grant, notwithstanding that such lands are also within the indemnity limits of the Atlantic and Pacific Grant.

The lands involved under this point are shown in red on Map 3.

While it is established law that lands within the common primary limits of contemporaneous grants to two railroads which intersect or run in close proximity to one another are to be equally divided between them, it is at the same time equally well settled that in the case of the common indemnity lands of two such roads no rule of the sort applies, and as between them the one which makes the first selection from their common indemnity limits is entitled thereto.

In St. Paul Railroad vs. Winona Railroad, 112 U. S., 720, it was held that:

> "When the acts of Congress * * * are of the same date, or grants are made for different roads by the same statute * * * in case of lands to be selected in lieu of those within the limits of primary

> location, which have been sold or pre-empted before the location is made, where the limits of selection interfere or overlap, * * * neither priority of grant, nor priority of location, nor priority of construction, gives priority of right; *but this is determined by priority of selection when the selection is made according to law.*"

The doctrine that the title to indemnity lands remained in the United States until selection and approval has been recognized by this Court in an unbroken line of decisions.

In the case of New Orleans and Pacific Railway vs. Parker, 143 U. S., 42, it was said by Mr. Justice BREWER at page 57 that:

> "As to lands within the indemnity limits, it has always been held that no title is acquired until the specific parcels have been selected by the grantee and approved by the Secretary of the Interior."

In United States vs. Missouri, etc. Railway, 141 U. S., 358, Mr. Justice HARLAN again stated the rule as follows at page 374:

> "As to lands which may legally be taken for purposes of indemnity, the principle is firmly established that title to them does not vest in the railroad company for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the

United States until they are actually selected and set apart under the direction of the Secretary of the Interior specifically for indemnity purposes."

In Wisconsin Railroad Company vs. Price County, 133 U. S., 496, 512, Mr. Justice FIELD, who delivered the opinion of the Court, said:

> "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine that until selection made no title vests in any indemnity lands has been recognized in several decisions of this Court."

In Barney vs. Winona, etc., Railroad, 117 U. S., 228, Mr. Justice FIELD, at page 232, said:

> "In the construction of land-grant acts in aid of railroads there is a well-established distinction observed between 'granted lands'

> and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the Act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection."

We have, therefore, this situation: If there had been no Forfeiture Act of 1886, the Southern Pacific would be in a position to select from the common indemnity limits of the two grants any land not theretofore selected by the Atlantic and Pacific. Such right was in existence at the date of said act of forfeiture, and the question is whether such right of the Southern Pacific was forfeited by an act which, so far as unselected Atlantic and Pacific indemnity lands were concerned must be deemed to have been passed solely to forfeit the right of the Atlantic and Pacific to make such selection.

It is unnecessary to elaborate at any great length this proposition. The mere statement of it would seem enough. On July 5, 1886, the Southern Pacific had an undisputed right as against the Atlantic and Pacific to select in-

demnity lands from the indemnity limits common to the two grants. Did the Southern Pacific lose that right on July 6, 1886, by an act which did not undertake to forfeit any rights of the Southern Pacific, but forfeited only rights of the Atlantic and Pacific?

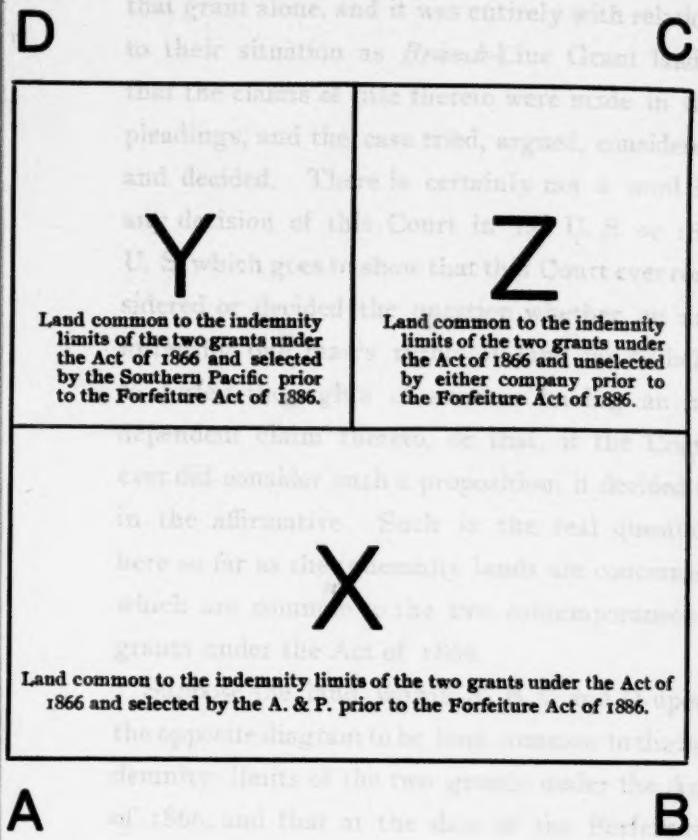
It can hardly be seriously argued that a forfeiture act is ever to be given a force and effect beyond its terms. It is construed as strictly as any penal act, and we have not yet found or been referred to any decision which says that an act which by its terms forfeits, and which was intended to forfeit, only A's rights in certain lands, can by any possibility be construed as forfeiting B's rights in such lands also.

It is impossible to say that there is any prior decision of this Court which is a bar to the raising of this question in the present case. There were no indemnity lands of the Southern Pacific *Main*-Line Grant involved in the cases in 146 U. S. It is true that a claim might have been set up under the indemnity clause of the Southern Pacific *Main*-Line Grant to a small amount of land which was in controversy in the case in 168 U. S., but no such claim was set up or adjudicated. The lands referred to were at

the same time embraced in the Southern Pacific *Branch*-Line Grant; they were claimed under that grant alone, and it was entirely with relation to their situation as *Branch*-Line Grant lands, that the claims of title thereto were made in the pleadings, and the case tried, argued, considered and decided. There is certainly not a word in any decision of this Court in 146 U. S. or 168 U. S. which goes to show that this Court ever considered or decided the question whether an act forfeiting one man's rights in land can be held to forfeit the rights of another having an independent claim thereto, or that, if the Court ever did consider such a proposition, it decided it in the affirmative. Such is the real question here so far as the indemnity lands are concerned which are common to the two contemporaneous grants under the Act of 1866.

Suppose the land within A, B, C and D upon the opposite diagram to be land common to the indemnity limits of the two grants under the Act of 1866, and that at the date of the Forfeiture Act section X thereof had been selected by the Atlantic and Pacific and such selection approved by the Secretary of the Interior, section Y by the Southern Pacific, and section Z by neither of

C
D
Z
Land common to the indemnity limits of the two grants under the Act of 1866 and selected by the Southern Pacific under the Act of 1866 and unselected by the other company prior to the Forfeiture Act of 1885.
Y
Land common to the indemnity limits of the two grants under the Act of 1866 and selected by the Southern Pacific prior to the Forfeiture Act of 1885.
X
B
A


D
C
Y
Land common to the indemnity limits of the two grants under the Act of 1866 and selected by the Southern Pacific prior to the Forfeiture Act of 1886.
Z
Land common to the indemnity limits of the two grants under the Act of 1866 and unselected by either company prior to the Forfeiture Act of 1886.
X
Land common to the indemnity limits of the two grants under the Act of 1866 and selected by the A. & P. prior to the Forfeiture Act of 1886.
A
B

the Companies. The result of the passage of the Act of 1886 would, we take it, have been to restore section X to the public domain, to have left section Y as it found it, and to have left section Z as it was so far as the rights therein of the Southern Pacific were concerned, but to have taken from the Atlantic and Pacific its right to ever exercise a right of selection in regard thereto.

In other words, the Forfeiture Act of 1886 forfeited only the land selected by the Atlantic and Pacific and the right of selection of the Atlantic and Pacific in the unselected land within the indemnity limits of its grant, and did not undertake or pretend to forfeit whatever right of selection the Southern Pacific had in such land.

FOURTH POINT.

The Southern Pacific Railroad Company is entitled to select from the place and indemnity lands of the Atlantic and Pacific grant, which have been actually restored to the public domain by the Act of 1886, any lands which are within its own indemnity limits, whether under its Main or Branch Line Grant, to supply losses within its Main and Branch line place limits.

This question is entirely apart from the right of the Southern Pacific (1) to a moiety of the

lands common to the place limits of the two grants under the Act of 1866, (2) to all the lands within its *Main*-Line place limits which also fall within the indemnity limits of the Atlantic and Pacific Grant, and (3) to select lands within the indemnity limits common to the two grants under the Act of 1866.

The point which we now make is that a railroad is entitled to select indemnity lands from any lands within its indemnity limits which at the time of selection are public lands.

The lands which are involved in the discussion of this branch of the case are:

1. Lands common to the indemnity limits of the Southern Pacific *Main*-Line Grant and either the place or indemnity limits of the Atlantic and Pacific Grant, which are shown in red on Map 4.

2. Lands common to the indemnity limits of the Southern Pacific *Branch*-Line Grant and either the place or indemnity limits of the Atlantic and Pacific Grant, which are shown in red on Map 5.

As we understand it, the case of Ryan vs. Railroad Co., 99 U. S., 382, is on all fours with the case at bar. In the Ryan case the land in controversy was within the indemnity limits of the

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grant in aid of the California and Oregon Railroad Company under the Act of July 25, 1866 (14 Stat., 239). At the time of the grant to the railroad company the land was not public land, but was claimed to be within the boundaries of a prior Mexican grant. Between the date of the granting act and of the selection of the land by the railroad, and about a year prior to such selection, this Court held the Mexican grant invalid, and the land was thereby restored to the public domain. It was decided that, whereas the rights of the company under such a grant, in respect to lands within *primary* limits, depend upon the status of the lands, as public lands or otherwise, at the date of the act and the time of definite location, the rights to lands within *indemnity* limits depend upon their status, as public lands or otherwise, at the date of selection.

The Court in the Ryan case especially distinguished it from Newhall vs. Sanger, 92 U. S., 761, where the land restored to the public domain was within the primary or granted limits of the company, and at the time of the grant thereof and its location was affected by an adverse claim, so that the railroad was not capable of taking title thereto. The Court in the Ryan case said at page 388:

> "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose. It was taken to help satisfy the grant to the extent that the odd sections originally given failed to meet its requirements. When so selected there was no Mexican or other claim impending over it. It had ceased to be *sub judice* and was no longer in litigation. It was as much 'public land' as any other part of the national domain. The patent gave the same title to the appellee that a like patent for any other public land would have given to any other party. The Mexican claim when condemned lost its vitality. From that time, as regards the future, it ceased to be a factor to be considered, and was in all respects as if it had never existed. In this state of things the appellee acquired its title, and that title is indefeasible."

So in the present case the land within the indemnity limits of the two Southern Pacific Grants, which was also embraced within both the primary and indemnity limits of the Atlantic and Pacific Grant, is now, since the Forfeiture Act of 1886 (except so far as the indemnity rights of the Southern Pacific therein are concerned), as much a part of the public domain

of the United States as any of the land of the United States. The right of the Southern Pacific to select such lands within its indemnity limits is entirely unaffected by the past history of that land. It is as if the grant to the Atlantic and Pacific "had never existed." The question is: What is that land now, when selection is sought to be made? Is it now public land or not? If it is now public land, it is of no importance whatever what parties in the past may have had claims or rights thereto, and it would seem absolutely immaterial whether the title to such land had formerly been claimed under a Mexican title thereafter declared void (as in the Ryan case), or under a grant of the United States subsequently declared to be forfeited, as in the case at bar.

In Alabama and Chattanooga R. R. Co., XX. L. D., 408, it appeared that the land in question had been taken under a homestead entry at the time the railroad made application to select the same as within its indemnity limits. The claim under the homestead entry was afterwards relinquished to the United States, "thus leaving the question wholly between the company and the United States" as to whether the railroad

was entitled to the land after its restoration to the public domain. Secretary Smith held that:

> "While the selection in question could not properly have been allowed at the time made by reason of Morton's entry, yet it now appears that such entry never ripened into a patent, but was relinquished to the United States. That being true, I see no reason why the selection may not now be approved."

In Southern Pacific R. R. Co., XXVI. L. D., 452, it was held by Secretary Bliss that:

> "Lands excepted from the grant to the Southern Pacific by homestead entries that were existing at the date when the grant took effect may be taken on behalf of said grant in lieu of mineral lands, if at the date of selection such entries have been canceled, and the lands are free from other claims or rights" (Syllabus).

Since the Ryan case the decisions of the Department of the Interior have been invariably to the effect that the status of lands within indemnity limits at the time of selection determines entirely the right of the railroad thereto.

In *Allers vs. Northern Pacific R. R. Co.*, 9 L. D., 452 (1899), Secretary Noble held that:

"A tract is not excluded from indemnity selection by reason of its being within the *primary limits* of another grant, if it is in fact vacant public land at date of selection and otherwise subject to such appropriation."

In *Northern Pacific R. R. Co. vs. Halvorson*, 10 L. D., 15 (1890), Secretary Noble held that:

"The right to *select indemnity* is not defeated by the fact that the land is within the *primary limits* of another grant, if the land is excepted from such grant and vacant public land at date of selection."

In *Missouri, K. & T. Ry. Co. vs. Beal*, 10 L. D., 504 (1890), Secretary Noble held that:

"Prior to selection, the right to indemnity lands is only a float; and the right acquired by selection is dependent upon the status of the lands at date of selection, and not at date of withdrawal."

In *Northern Pacific R. R. Co. vs. Moling*, 11 L. D., 138 (1890), Secretary Noble held that:

"The right to select a tract as indemnity under a railroad grant is not defeated by the mere fact that the selection is within the *primary limits* of another grant, if the tract is vacant public land at date of selection."

In *Hensley vs. Missouri, K. & T. Ry. Co.*, 12 L. D., 19 (1891), Secretary Noble held that:

> "The right to take a tract of land as indemnity is determined by its status at the date of selection, and not at date of withdrawal."

In *Northern Pacific R. R. Co. vs. Bass*, 13 L. D., 201 (1891), Acting Secretary Chandler held that:

> "The mere fact that a tract is within the *geographical* limits of another grant will not defeat the right to select the same as indemnity, if it is otherwise subject to selection."

In *Hastings and Dakota Ry. Co. vs. St. Paul, M. & M. Ry. Co.*, 13 L. D., 535 (1891), Acting Secretary Chandler held that

> "The right acquired by an indemnity selection is dependent upon the status of the land at date of selection."

In *St. Paul, M. & M. R. Co. vs. Munz*, 17 L. D., 288 (1893), Secretary Smith held that:

> "A tract of land within the *primary limits* of one grant and the *indemnity limits* of another, may be selected by the latter, on proper basis, if excepted from the grant to the former, and free from other claims at date of selection."

In *South and North Alabama R. R. Co. vs.*

Hall, 22 L. D., 273 (1896), Secretary Smith held that:

> "The status of indemnity lands at the date of selection, not definite location of the road, determines the right of the company thereto."

In *Southern Pacific Railroad Company vs. McKinley*, 22 L. D., 493 (1896), Secretary Smith held that:

> "The right of a railroad company to take a tract of land as indemnity must be determined by the status of such tract at the date of the application to select the same."

It may be said by counsel for the Government that Bardon vs. Northern Pacific Railroad, 145 U. S., 535, is in conflict with the doctrine of the Ryan case. We do not so understand it. In the Bardon case the land in controversy was within the *place* limits of the grant to the Northern Pacific Railroad Company. At the time the railroad took title to its place lands, the land involved was not public land, and was excepted from the grant for the reason that it had been taken up on a pre-emption claim, and the only question before the Court was whether, upon the restoration to the public domain of lands

within the place limits of a railroad grant, which were reserved at the time of the grant, such lands fell within the grant. It was then held that the land in question could not be acquired by the railroad as part of its *place* lands for the reason that it "was severed from the mass of public lands from which the grant to the Northern Pacific Railroad Company could alone be satisfied" by the terms of the granting act, which gave to the railroad for its place limits ten alternate sections of land "not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed." In other words, the Court held that at the time the road of the Northern Pacific was definitely fixed the land involved was pre-empted. It did not, therefore, then fall within the grant of *place* lands, and could not thereafter by reason of the cancellation of the pre-emption claim, because it was too late, the grant of the place lands by its terms only taking effect as of a certain time—viz., when the line of road was definitely fixed, which was prior to the cancellation of the claim.

It was at the same time held that the land so

restored to the public domain could not be taken by the railroad as indemnity land to make up a deficiency within the place limits for the sole reason that such deficiency could only be supplied from land within the limits expressly specified by Congress.

It is hard to conceive that anyone could seriously consider that the Bardon case in any way conflicts with the doctrine of the Ryan case above quoted. It may be that the counsel for the Government will make the same quotation from the decision in the Bardon case which he did in the court below, which was from page 545 as follows:

> "Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits."

If counsel had quoted the succeeding sentence, he would have found the reason well stated as to why such lands could not be taken as a source of indemnity. It was that "*such deficiencies can only be supplied from lands within limits designated by the granting act or other law of Congress.*" That is to say, all lands which are taken to supply a deficiency in the place limits

of a railroad grant must be taken from the indemnity limits of that grant and from no other lands. The land involved in the Bardon case was not within such indemnity limits, and therefore could not be considered a "source of indemnity."

It would, therefore, seem very clear that this Court did not undertake to decide in the Bardon case that, if the pre-empted land in question had been within the indemnity limits of the Northern Pacific grant, and the pre-emption claim had been canceled subsequent to the granting act, the railroad would not have been entitled to select such land as indemnity land after its restoration to the public domain. The only possible inference from the case is that, if such question had been before it for determination, it would have decided that the railroad was entitled to make such selection, for the sole reason given by the Court why the land after restoration to the public domain could not be taken as indemnity land was that it was not situated within the indemnity limits granted to the railroad company, implying that, if it had been within such indemnity limits, the railroad company would have been entitled to it after

it had been restored to the public domain, although it was not public land at the time of the grant.

The Ryan case has since its decision always been referred to with approval by this Court and is now established law. The decisions of the Interior Department have ever since the Ryan case been in accord therewith. We, therefore, respectfully submit that the Southern Pacific is now entitled to select from within the indemnity limits of both Main and Branch Line Grants the lands of the Atlantic and Pacific which were restored to the public domain by the Forfeiture Act of 1886.

The Government will perhaps contend that the question of the right of the Southern Pacific under its *Branch*-Line Grant to select lands from its indemnity limits which were restored to the public domain by the Act of Forfeiture of 1886 has already been adjudicated against the Railroad Company, and that all discussion of such question is precluded by the decision of this Court in Southern Pacific Railroad vs. United States, 168 U. S., 1.

It is no doubt true that in the case referred to a part of the land in controversy was within the

indemnity limits of the Branch-Line Grant to the Southern Pacific, but in that case there was no discussion whatever of the question whether lands within the indemnity limits of a railroad grant, which were reserved at time of the grant, but subsequently restored to the public domain, could after such restoration be selected by the Railroad Company in lieu of losses within the primary limits. No such question was presented to the Court or considered by it, and the sole ground of the decision was that the Southern Pacific was estopped from raising the questions involved in the case because of the decisions of the Court reported in 146 U. S.

Turning to such decisions we find that there were no *indemnity* lands of the Southern Pacific involved therein. The cases in 146 U. S. related entirely to *place* lands of the Southern Pacific *Branch*-Line Grant and their conflict with Atlantic and Pacific place lands (146 U. S., 570) and indemnity lands (146 U. S., 615), and the question decided therein was that the Atlantic and Pacific had filed a good and sufficient map of definite location and had a title to its place lands as of the date of the granting act (Act of July 27, 1866), and that upon the forfeiture

of such lands the Southern Pacific could not take title thereto under its primary or place grant, as whatever it was entitled to thereunder was the land free from any claim at the time of filing the map of definite location of the road in accordance with the decision of this Court in Newhall vs. Sanger, 92 U. S., 761.

We have already quoted from Mr. Justice BREWER'S decision in 146 U. S., 615, 618 for the purpose of showing how careful the Court was to indicate that such decision was limited entirely to the *place* lands of the *Branch*-Line Grant as distinguished from the *indemnity* lands, and we now cite from it again as follows:

> "It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and that they are not lands in respect to which that company would have a right of selection, and might defer the exercise of that right until such time as suited it. Being within the granted limits of the Southern Pacific, all its rights thereto vested at once, at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic and Pacific Company to make a selection."

The question now before the Court, which was squarely decided in our favor in the case of Ryan vs. Railroad Co., 99 U. S., 382, was therefore never by any possible view of the matter before the Court in the cases in 146 U. S.; and, as the case in 168 U. S. was decided solely upon the ground that all questions therein had been determined in the cases in 146 U. S., it is obvious that the right of the Southern Pacific to select under its indemnity clause and from within its indemnity limits the Atlantic and Pacific lands restored to the public domain by the Act of 1886 has never been passed upon and decided by this Court, but that, on the contrary, a very similar, if not identical, right in favor of the Central Pacific was conceded by this Court in the Ryan case.

FIFTH POINT.

The decree of the Court below should be reversed.

L. E. PAYSON,
MAXWELL EVARTS,
Of Counsel for the Appellants.

APPENDIX.

Atlantic and Pacific Act (14 United States Statutes at Large, p. 292).

CHAPTER CCLXXVIII.

An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That John B. Brown, Anson P. Morrill, Samuel F. Hersey, William G. Crosby, Samuel E. Spring, Samuel P. Dinsmore, of Maine; N. S. Upham, Frederick Smyth, Onslow Stearns, S. G. Griffin, William E. Chandler, of New Hampshire; T. W. Park, H. H. Baxter, John Gregory Smith, A. P. Lyman, of Vermont; Walter S. Burges, William S. Slater, Stephen Harris, Thomas P. Shepard, of Rhode Island; William Merritt, Alexander H. Bullock, George L. Stearns, Genery Twitchell, Charles H. Warren, Chester W. Chapin, of Massachusetts; John Boyd, Robert C. Wetmore, John T. Wait, Cyrus Northrop, of Connecticut; Solon Humphreys, J. Bigler, Homer Ramsdell, Isaac H. Knox, John A. C. Gray, Daniel L. Ross, A. V. Stout, M. K. Jessup, R. E. Fenton, E. L. Fancher, J. C. Fremont, James Hoy, Jesse M. Bolles, Edward Gilbert, James P. Robinson, Oliver C. Billings, of New York; Charles Bachelor, John Edgar Thompson, Morton McMichael, T. Haskins Du Puy, Thomas A. Scott, Charles Rickettson, William Lyon, George W. Cass, Levi Parsons, of Pennsylvania; Charles Knap, J. L. N. Stratton, James B. Dayton, Robert F. Stockton, Alexander G. Cattell, A. W. Markley, of New Jersey; John W. Garrett, Charles J. M. Gwinn, Robert Fowler, Jacob Tome, Thomas M. Lana-

han, of Maryland; Charles J. Dupont, Henry Ridgley, Andrew C. Gray, Nat. Smythers, of Delaware; Bellamy Storer, George B. Senter, William Baker, Samuel Galloway, David Tod, Charles Anderson, Bird B. Chapman, Edward Sturgis, Israel Dille, of Ohio; Edwin Peck, William D. Griswold, James P. Luse, Samuel E. Perkins, Conrad Baker, of Indiana; Richard J. Oglesby, N. B. Judd, Samuel A. Buckmaster, D. L. Phillips, L. P. Sanger, of Illinois; Eber B. Ward, Omar D. Congar, Nathaniel W. Brooks, Alexander H. Morrison, of Michigan; Z. G. Simmons, Alexander Mitchell, J. J. Williams, G. A. Thompson, J. J. R. Pease, John H. Hersey, of Wisconsin; Henry A. Smith, Sherman Finch, William Mitchell, R. F. Crowell, L. F. Hubbard, E. F. Drake, of Minnesota; Lyman Cook, Platt Smith, Jacob Butler, Henry I. Reid, Hoyt Sherman, of Iowa; William G. Brownlow, of Tennessee; Thomas C. Fletcher, B. R. Bonner, John M. Richardson, Emil Pretorious, E. W. Fox, R. J. McElheny, Charles H. Howland, Madison Miller, George W. Fishback, T. J. Hubbard, George Knapp, Charles K. Dickson, A. G. Braun, G. L. Hewitt, P. A. Thompson, James W. Thomas, Charles E. Moss, Edward Walsh, A. R. Easton, Truman J. Horner, J. B. Eads, D. R. Garrison, W. A. Kayser, George P. Robinson, of Missouri; Thomas E. Bramlette, Benjamin Gratz, C. E. Warren, Lazarus W. Powell, John Mason Brown, Joshua Speed, of Kentucky; Solon Thatcher, Jacob Stotter, William B. Edwards, James G. Blunt, Robert McBratney, of Kansas; Harrison Hagaus, James Cook, Robert Crangle, Benjamin H. Smith, of West Virginia; Lorenzo Sherwood, A. J. Hamilton, of Texas; William Gilpin, Henry C. Leach, of Colorado; Phinneas Banning, Timothy G. Phelps, William B. Carr, Edward F. Beale, Fred. F. Lowe, Benj. B. Redding, B. W. Hathaway, Leonidas Haskell, Frederick Billings, of California; W. S. Ladd, J. R. Moores, Walter Monteith, John Kelly, B. F. Dowell, of Oregon; James L. Johnson, Henry Connelly, Franciscus Perea, of New Mexico; J. H. Mills, A. P. K. Safford, E. S. Davis, of Nevada; King S.

Woolsey, William H. Hardy, Coles Bashford, of Arizona; Henry D. Cook, of the District of Columbia; and all such other persons who shall or may be associated with them, and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the "Atlantic and Pacific Railroad Company," and by that name shall have perpetual succession, and shall be able to sue and be sued, plead and be impleaded, defend and be defended, in all courts of law and equity within the United States, and may make and have a common seal. And said corporation is hereby authorized and empowered to lay out, locate and construct, furnish, maintain and enjoy, a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the Town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said Company to a point on the Canadian River; thence to the Town of Albuquerque, on the River Del Norte, and thence by way of the Agua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado River, at such point as may be selected by said Company for crossing; thence by the most practicable and eligible route to the Pacific. The said Company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly along the most suitable route as selected to a point in the western boundary line of Arkansas, at or near the Town of Van Buren. And the said Company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. The capital stock of said Company shall consist of one million shares of one hundred dollars each, which shall in all respects be deemed personal property, and shall be transferable in such manner as the laws of said corporation shall provide. The persons hereinbefore named are hereby appointed

commissioners, and shall be called the "Board of Commissioners of the Atlantic and Pacific Railroad Company," and fifteen shall constitute a quorum for the transaction of business. The first meeting of said board of commissioners shall be held at the Turner Hall, in the City of St. Louis, on the first day of October, anno Domini eighteen hundred and sixty-six, or at such time within three months thereafter as any ten commissioners herein named from Missouri shall appoint, notice of which shall be given by them to the other commissioners by publishing said notice in at least one daily newspaper in the cities of Boston, New York, Cincinnati, Saint Louis, Memphis and Nashville, once a week for at least four weeks previous to the day of meeting. Said board shall organize by the choice from its number of a President, Vice-President, Secretary and Treasurer, and they shall require from said Treasurer such bonds as may be deemed proper, and may from time to time increase the amount thereof, as they may deem proper. The Secretary shall be sworn to the faithful performance of his duties, and such oath shall be entered upon the records of the company, signed by him, and the oath verified thereon. The president and secretary of said boards shall, in like manner, call all other meetings, naming the time and place thereof. It shall be the duty of said board of commissioners to open books, or cause books to be opened, at such times and in such principal cities or other places in the United States as they or a quorum of them shall determine, within twelve months after the passage of this act; to receive subscriptions to the capital stock of said corporation, and a cash payment of ten per centum on all subscriptions, and to receipt therefor. So soon as ten thousand shares shall in good faith be subscribed for, and ten dollars per share actually paid into the treasury of the company, the said president and secretary of said board of commissioners shall appoint a time and place for the first meeting of the subscribers to the stock of said company, and shall give notice thereof in at least one newspaper in each State in which sub-

n books have been opened, at least fifteen days previous to the day of meeting, and such subscribers as shall attend the meeting so called, either in person or by lawful proxy, then and there shall elect, by ballot, thirteen directors for said corporation; and in such election each share of said capital stock shall entitle the owner thereof to one vote. The president and secretary of the board of commissioners, and, in case of their absence or inability, any two of the officers of said board shall act as inspectors of said election, and shall certify, under their hands, the names of the directors elected at said meeting. And the said commissioners, treasurer and secretary shall then deliver over to said directors all the moneys, properties, subscription books and other books in their possession, and thereupon the duties of said commissioners and the officers previously appointed by them shall cease and determine forever, and thereafter the stockholders shall constitute said body politic and corporate. Annual meetings of the stockholders of the said corporation for the choice of officers (when they are to be chosen), and for the transaction of business, shall be holden at such time and place and upon such notice as may be prescribed in the by-laws.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side-tracks, turn-tables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall

extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided, further*, That

the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided, further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided, further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific Railroad.

SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the Company to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every

twenty-five miles of said road is completed as aforesaid.

SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line of the most substantial and approved description, to be operated along the entire line: *Provided*, That the said company shall not charge the Government higher rates than they do individuals for like transportation and telegraphic service. And it shall be the duty of the Atlantic and Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States, or by the Legislature of any Territory or State in which the same may be situated, to form running connections with it, on fair and equitable terms.

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An Act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company.

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its roadbed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the Territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rights of said company to enter upon the premises taken, or to do any act necessary and proper in the construction of its road. And said party appealing shall give bonds,

with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and, in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner of said premises taken, at a sum equal to that finally awarded, shall be held to vest in said company the title of said lands, and of the right to use and occupy the same for the construction, maintenance and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by an infant, femme covert, non compos, insane person, or persons residing without the Territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in the manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine

the kinds of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or nonappearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation.

SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act and not afterwards, and shall be deposited in the office of the Secretary of the Interior.

SEC. 13. *And be it further enacted*, That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall, from time to time, fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property on said road or any part thereof.

SEC. 14. *And be it further enacted*, That the directors chosen in pursuance of the first section of this act shall, so soon as may be after their election, elect from their own number a president and vice-president; and said board of directors shall, from time to time, and so soon as may be after their election, choose a treasurer and secretary, who shall hold their offices at the will and pleasure of the board of directors. The treasurer and secretary shall give such bonds, with such security, as the said board from time to time may require. The secretary shall, before entering upon his duty, be sworn to a faithful discharge thereof, and said oath shall be made a matter of record upon the books of said corporation. No person shall be a director of said company unless he shall be a stockholder, and qualified to vote for directors at the election at which he shall be chosen.

SEC. 15. *And be it further enacted*, That the president, vice-president and directors shall hold their offices for the period indicated in the by-laws of said company, not exceeding three years, respectively, and until others are chosen in their place, and qualified. In case it shall

so happen that an election of directors shall not be made on any day appointed by the by-laws of said company, the corporation shall not for that excuse be deemed to be dissolved, but such election may be holden on any day which shall be appointed by the directors. The directors, of whom seven, including the president, shall be a quorum for the transaction of business, shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate and effects of the company, the transfer of shares, the duties and conduct of their officers and servants touching the election and meeting of the directors, and all matters whatsoever which may appertain to the concerns of said company; and the said board of directors may have full power to fill any vacancy or vacancies that may occur from any cause or causes from time to time in their said board. And the said board of directors shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of the company, and to do all acts and things touching the location and construction of said road.

SEC. 16. *And be it further enacted*, That it shall be lawful for the directors of said company to require payment of the sum of ten per centum cash assessment upon all subscriptions received of all subscribers, and the balance thereof at such times and in such proportions and on such conditions as they shall deem to be necessary to complete the said road and telegraph lines within the time in this act prescribed. Sixty days' previous notice shall be given of the payments required, and of the time and place of payment, by publishing a notice once a week in one daily newspaper in each of the cities of Boston, New York, Cincinnati, Saint Louis, Memphis and Nashville, and in case any stockholder shall neglect or refuse to pay, in pursuance of such notice, the stock held by such person shall be forfeited absolutely to the use of the company, and also any payment or payments that shall have been made on account thereof, subject to

the condition that the board of directors may allow the redemption on such terms as they may prescribe.

SEC. 17. *And be it further enacted*, That the said company is authorized to accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to or conferred on said company by the Congress of the United States by the legislature of any State, or by any corporation, person or persons, or by any Indian tribe or nation through whose reservation the road herein provided for may pass; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistance, to its own use, for the purpose aforesaid: *Provided* that any such grant or donation, power, aid or assistance from any Indian tribe or nation shall be subject to the approval of the President of the United States.

SEC. 18. *And be it further enacted, That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.*

SEC. 19. *And be it further enacted*, That unless the said Atlantic and Pacific Railroad Company shall obtain *bona fide* subscriptions to the stock of said company to the amount of one million of dollars, with ten per centum paid, within two years after the passage of and approval of this act, it shall be null and void.

SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in

working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes—Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act.

SEC. 21. *And be it further enacted*, That whenever in any grant of land, or other subsidies, made or hereafter to be made, to railroads or other corporations, the United States has reserved the right, or shall reserve it, to appoint directors, engineers, commissioners or other agents to examine said roads, or act in conjunction with other officers of said company or companies, all the costs, charges and pay of said directors, engineers, commissioners or agents shall be paid by the respective companies. Said directors, engineers, commissioners or agents shall be paid for said services the sum of ten dollars per day for each and every day actually and necessarily employed, and ten cents per mile for each and every mile actually and necessarily traveled, in discharging the duties required of them, which per diem and mileage shall be in full compensation for said services. And in case any company shall refuse or neglect to make such payments, no more patents for lands or other subsidies shall be issued to said company, until these requirements are complied with.

Approved, July 27, 1866.

Joint Resolution Concerning the Southern Pacific Railroad of California (16 United States Statutes at Large, p. 382.)

Be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the Commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

Approved, June 28, 1870.

SECTION 23 OF THE TEXAS PACIFIC ACT (16 UNITED STATES STATUTES AT LARGE, P. 579).

SEC. 23. That, for the purpose of connecting the Texas Pacific Railroad with the City of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions, as were granted to said Southern Pacific Railroad Company of California by the Act of July twenty-seven, eighteen hundred and sixty-six; *provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Approved, March 3, 1871.

Atlantic and Pacific Forfeiture Act (24 United States Statutes at Large, p. 123).

CHAPTER DCXXXVII.

An Act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast, and to restore the same to settlement and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the lands, excepting the right of way and the right, power and authority given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots, machine-shops, switches, side-tracks, turntables and water stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress, which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and indemnity limits, as contemplated to be constructed under and by the provisions of the said Act of July twenty-seventh, eighteen hundred and sixty-six, and the acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph, be, and the same are hereby, declared forfeited and restored to the public domain.

Approved July 6, 1886.

LETTER OF SECRETARY LAMAR AS PRINTED IN VI. L. D., 349.

RAILROAD GRANT—COMMON GRANTED LIMITS—SOUTHERN PAC. R. R. CO.

The grant to the Atlantic Pacific and Southern Pacific was made by the same act; and, under the provisions thereof, the said companies were each entitled to an undivided moiety of every odd section, not reserved from the grant, falling within the common granted limits of the respective roads, without respect to priority of location or construction, the right of each company relating back to the date of the grant.

The forfeiture of the grant to the Atlantic Pacific did not reinvest the Southern Pacific with the right, title and interest, of which it was divested by the definite location of the Atlantic Pacific, as the declaration of forfeiture expressly provided for the restoration of the forfeited lands to the public domain.

If the Southern Pacific elect to accept every other alternate odd-numbered section within the said common limits, the remaining odd-numbered sections may be immediately restored to the public domain.

SECRETARY LAMAR TO ACTING-COMMISSIONER STOCKSLAGER, NOVEMBER 25, 1887.

A rule was served upon the Southern Pacific Railroad Company to show cause why certain lands adjacent to and coterminous with the uncompleted portion of the main line of the Atlantic and Pacific Railroad Company, which are intersected by the line of the Southern Pacific Company, should not be restored to the public domain, Congress having declared a forfeiture of the grant to the Atlantic and Pacific Company as to the uncompleted portion of said road.

In considering said rule upon the answer of the company, you held :

(1) That, since the grants to both of said companies were made by the same act, the Southern Pacific "is only entitled (if at all) to, and cannot rightfully claim more than, a moiety of the lands" in the conflicting granted limits, and the recommendation is made by your office

"that every other alternate odd-numbered section (as sections 1, 5, 9, etc.) be now restored to the public domain, leaving the remaining odd-numbered sections in reservation for the present."

(2) That the lands within the granted limits of the Southern Pacific main line, and the indemnity limits of the Atlantic and Pacific, are not affected by said act of forfeiture, and they should continue in reservation for the present.

(3) That the lands within the granted limits of the Atlantic and Pacific, and the indemnity limits of the Southern Pacific, "could not have been selected as indemnity by the Southern Pacific" for the reason that, although said lands were withdrawn for the Southern Pacific Company, they fell within the granted limits of the Atlantic and Pacific, upon the subsequent definite location of its road.

(4) That the lands within the common indemnity limits of the Atlantic and Pacific and the Southern Pacific (both main and branch line) should still remain in reservation.

(5) That the Southern Pacific Railroad Company can have no valid claim to lands within the common granted limits of the Atlantic and Pacific and the Southern Pacific branch line, and that such lands should be at once restored; and,

(6) That the Southern Pacific Company has no right to any lands within the indemnity limits of the Atlantic and Pacific Railroad Company and the granted limits of the branch line of the Southern Pacific Company, for the reason that they are excepted from the grant to the latter company on account of the prospective right of the former company to select said lands for indemnity.

While the rule was pending before the Department, all lands withdrawn for indemnity purposes for the benefit of the Southern Pacific Railroad Company and the Atlantic and Pacific R. R. Company were restored to the public domain by order of August 15, 1887 (6 L. D., 84–92).

Counsel for the Southern Pacific Railroad Company have now filed an application protesting against any further action for the restoration of lands within granted limits, because: (1) The right of the company vested by definite location and final completion of the road to all lands mentioned in the Commissioner's report of March last, and that the question as to what particular lands within said limits are granted or excepted does not properly arise now, and there is no case before the Department requiring a decision. (2) Because the lands were withdrawn by the Act of Congress making the grant.

I see no reason for any further action by the Department upon this rule, except as to lands embraced within the common granted or primary limits of both roads.

A decision upon this question is rendered necessary in order that you may not be hindered or delayed in the adjustment of this grant under the general instructions issued from this Department of November 22, 1887.

The Act of Congress of July 27, 1866 (14 Stat., 292), granted to the Atlantic and Pacific Company

Every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * ten alternate sections of land per mile on each side of said railroad, whenever it passed through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption, or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other land shall be selected by said company in lieu thereof.

By the 18th section of said act the Southern Pacific road was authorized to connect with the Atlantic and Pacific road at a point near the boundary line of California, with a similar grant of land subject to all the conditions and limitations provided for in said act.

The grant contained a proviso "that if said route

shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted to the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

Here is a grant made by the same act to each road, of certain odd sections, to be designated by the filing of a map of definite location, and of the right to select other lands as indemnity for such odd sections within the granted lands as may have been granted, sold, reserved or occupied by homestead and pre-emption settlers prior to date of definite location.

Therefore, the filing of the map of definite location by either of the roads vested in such road the right and title to all the odd-numbered sections within the designated limits, and not within the exceptions referred to, and of the right to select other lands within the indemnity limits in lieu of lands so excepted. But as neither road was prohibited from constructing upon or near the general line of the other road, and it being evident from the proviso referred to that Congress did not intend to make a double grant for the same general line of road, that right and title was subject to be divested to the extent of a half interest in all odd-numbered sections that might fall within the common granted limits of both roads.

The Southern Pacific Company located its main line January 3, 1867, and by the terms of the grant its right immediately attached to every odd section of land, not of the character excepted by the grant, and within the ten-mile limit, subject, however, to be divested to the extent of a half-interest in every such odd section that might fall within the common limits of both roads, after the filing of the map of definite location by the Atlantic and Pacific Company.

The Atlantic and Pacific Company filed its map of definite location April 11, 1872, and April 16, 1874, showing that the primary or granted limits of said road overlapped and conflicted with the primary or granted

limits of a portion of the Southern Pacific road. As to the lands falling within the granted limits of both roads, the filing of the map of definite location by the Atlantic and Pacific Company, showing such conflict, immediately divested the Southern Pacific Company of the right and title to a half interest in all such odd sections, and from that moment and by that act the two companies became entitled to equal undivided moieties in such sections, without regard to the priority of location of the line of the road, or priority of construction, the right of each company relating back to the date of the grant. St. Paul and Sioux City R. R. Co. vs. Winona and St. Paul R. R. Co. (112 U. S., 720); Sioux City R. R. Co. vs. Chicago R. R. Co. (117 U. S., 406).

It cannot be questioned that these completed acts on the part of both roads vested in each of said companies the right and title to their respective interests in said conflicting limits, and determined the extent and quantity of the grant to each company along that portion of their respective roads. That is, the Atlantic and Pacific Company had a vested interest in every odd section within the limits of its grant of the character contemplated by the grant, and not in conflict with the limits of the other road, and an undivided half interest in all such sections within the conflicting limits of the two roads, and also the right to indemnity for such sections or interest in sections that may have been pre-empted, sold, reserved, etc., as provided for by the grant. The same right vested in the other road as to lands similarly situated within its limits, and those vested rights, titles and interests were existing at the date of the forfeiture of the grant to the Atlantic and Pacific Company. If the Atlantic and Pacific Company had no such title and interest in these lands, there would have been nothing to forfeit. That it did have such right, title and interest cannot be questioned.

But it is insisted that by the act of forfeiture the Southern Pacific Company was reinvested with the right, title and interest of which it was divested by the filing of the

map of definite location by the Atlantic and Pacific Company. I do not think this position tenable, even if the act declaring a forfeiture of those lands was silent as to the disposition to be made of them. There was no restoration to a right in the Southern Pacific Company, because that company had no right to restore. The act of forfeiture divested the Atlantic and Pacific Company of all right, title and interest in said lands, and reinvested the title in the Government.

Congress, by the act of forfeiture, could have invested the Southern Pacific Company with the entire interest in the lands held in common by the two roads, but that it was not the intention of Congress to dispose of this interest of the Atlantic and Pacific Company in that manner is evident from the act of forfeiture, which declares that

> All the lands * * * which are adjacent to and coterminous with the uncompleted portions of the main line of said road [Atlantic and Pacific], embraced within both the granted and indemnity limits, * * * be, and the same are hereby, declared forfeited and *restored to the public domain*.

The interest of the Atlantic and Pacific Company having been forfeited to the United States, the effect of said forfeiture was to make the United States a tenant in common with the Southern Pacific Company as to said lands, and, therefore, all the odd sections within said limits should still remain in reservation until a partition thereof has been made.

If said company is willing to accede to the plan suggested by your office, and take only every other alternate odd-numbered section within said common limits, I know of no objection to such a course being taken, and the remaining odd-numbered sections could be immediately restored to the public domain. If, however, the company declines to accept said plan, it will be necessary to take other steps looking to a partition of the lands granted.

You will, therefore, notify the Southern Pacific Company that it will be allowed a reasonable time to advise your office of its acceptance or rejection of the plan proposed, and if said plan is rejected you will report the same to this Department for further action.

It not being necessary, at present, to pass upon the remaining question presented in the rule, the papers are herewith returned.